

Legal pragmatism and the pre-birth continuum: an absence of unifying principle

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The common law has historically been clear – the rights of the unborn do not exist prior to birth. A child becomes a legal person and able to enforce legal rights upon being born alive and having a separate existence from his or her mother. This article assesses whether new developments in biomedical technologies have left this legal principle inviolate and answers the question as to what is the state of law in relation to pre-birth. It is argued that there is a pre-birth continuum where the law punctuates points in a lineal timeline fashion as to when a pre-birth ‘non-entity’ becomes a legal entity. The article concludes that there is no singular rule of law with respect to being or becoming a human but rather a collection of discrete and increasingly divergent legal categories. This recognition of a pre-birth continuum or timeline as to the legal recognition of this ‘non-entity’ has significant ramifications for the future development of law and impact on legal thinking about what it means to be human.

INTRODUCTION

At common law, a human does not attain legal rights until being “born alive”.¹ This traditional assumption permeates the common law – both civil and criminal. This article suggests that the allure of this rule lies in its simplicity rather than its accuracy and that in part it is a legal fiction which hides both the pragmatism of the common law in finding exceptions to the general rule and the growing legislative intervention which is changing both the legal functions of creating rights and affording protection to the unborn child, embryo or fetus in this area.²

At first blush this argument is not new. The classification of the fetus in law has always been a work of legal fiction, as stated in the decision of the Supreme Court of Canada in *Tremblay v Daigle* [1989] 2 SCR 530:

The tasks of properly classifying a foetus in law and in science are different pursuits. Ascribing personhood to a foetus in law is a fundamentally normative task. It results in the recognition of rights and duties - a matter which falls outside the concerns of scientific classification. In short, this court's task is a legal one. Decisions based

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¹ This article does not cover other ‘non-legal’ developments such as professional position papers: see AMA ‘Fetal welfare and the law’ at www.ama.com.au viewed 19 May 2006.

² Terminology is difficult, due both to potential emotional ‘bias’ and the lack of scientific/legal/moral/religious agreement. For this reason this article will use a combination of terms such as fetus and embryo and unborn child except where the terms are defined in particular areas of law.

upon broad social, political, moral and economic choices are more appropriately left to the legislature.

On closer analysis since 1989, when the above judicial commentary was made, there has been a rapid escalation in pressure upon the law to respond to biomedical developments. These new biomedical possibilities, such as cloning Matilda, Australia's first sheep in 2000 and creating the first Australian embryonic stem cell line (2004) bring us to the threshold of regulatory questions which cut across the disciplines of law, ethics, morals, politics, economics and religion. As a result within almost all areas of law there is a necessity to address issues as to the regulation, rights, protection of the not yet conceived, the embryo, the fetus, the unborn child. In short biomedical developments have thrown the development of a pre-birth continuum into sharp relief.

What is new therefore is not the traditional common law 'born alive' rule being subject to stress, as this has always been the case particularly around pregnancy where issues such as abortion and conflicting maternal and fetal interests have been the subject of much historical and ongoing debate.³ Rather it is that biomedical developments are forcing judges and legislators to recognize, define and then afford rights or protection to a human, a fetus, a embryo or an unborn child in areas as diverse as patents, discrimination, cloning, torts, inheritance, child protection, family law, immigration, contracts, criminal law and discrimination law.⁴

The pre-birth continuum

This article explores whether the legal response across these areas is consistent and suggests three outcomes from this analysis. Firstly, current legislative and judicial authority illustrate that the legal response is pragmatic with the recognition of the 'pre-birth entity' differing according to the regulatory purpose and policy objectives of the particular legal area. Secondly, it is argued that this legally pragmatic segregated development may be mapped as a pre-birth continuum. This concept of continuum mapping reflects the 'timeline' notion that the law has utilized in recognizing the existence of an entity. Rather than affording legal rights and responsibilities the timeline is a continuum as to when 'some thing' exists in law – or as to when there is 'not nothing'.⁵ Finally this legal continuum of a pre-birth entity suggests that the question as to when life begins at law depends upon why the law is asking the question, the essence of a pre-birth continuum being determined by reference to the area of law in which the question is asked. This adds a biomedical dimension to the three models of the maternal-fetal relationship.⁶ These three models – that the fetus is a part of the woman's body; that

³ See, eg, Reed H, "A Pregnant Woman's Rights Versus a Fetus's Rights: What is the Australian Position?" (1996) 4 *Journal of Law and Medicine* 165 at 172-3; Cica N, *Abortion Law in Australia* (Parliament of Australia, Research Paper 1 1998-99, 31 August 1998 Australia); Seymour J, *Childbirth and the Law* (Oxford University Press, 2000); Scott R, *Rights, Duties and the Body: Law and Ethics of the Maternal-Fetal Conflict* (Oxford, Hart Publishing, 2002); Barry JV, "The Child *en Ventre sa Mere*" (1941) 14 *The Australian Law Journal* at 351

⁴ See Table 1: Overview of the Pre-birth Continuum

⁵ *St George Health Care N.H.S. Trust v S* [1998] 3 WLR 936 at 952

⁶ Developed by John Seymour, eg Seymour J, "Legal status of the fetus: an international review" (2002) 10 *Journal of Law and Medicine* 28. These models conceptualize the relationship between a pregnant

the woman and her fetus may be indivisibly linked and the third, that they may be viewed as separate entities – may now be supplemented by a legal continuum which does not define a fetus in relation to the rights of its mother but rather defines the existence of a pre-birth entity in terms of the legal recognition required by a specific policy area of law.

Three significant legal ramifications (apart from moral, religious and ethical ramifications⁷) flow from accepting a pre-birth continuum:

- (1) policymakers may continue to implement through statute different timeline points of recognition as to when a not yet conceived child, a embryo and/or a fetus moves from non-entity to a legal entity;
- (2) judges may similarly continue to do so in common law and statutory interpretation; and
- (3) a universal legal definition of human life is not required as it is the policy needs of particular areas of the law which will drive the recognition, definition, legal protection and rights along a pre-birth continuum.

THE IMPACT OF BIOMEDICAL INNOVATION

The ‘born alive’ rule dominates legal recognition of the rights of a human being. There is a long line of authority which establishes that, for purposes of the civil law including succession law, the *parens patriae* jurisdiction and the law of torts, the position is as stated by Sir George Baker in *Paton v British Pregnancy Advisory Service Trustees* [1979] QB 276 at 279:⁸

The foetus cannot, in English law, in my view, have a right of its own at least until it is born and has a separate existence from its mother. That permeates the whole of the civil law of this country (I except the criminal law, which is now irrelevant) ...

This rule is broadly replicated in the criminal law⁹ and forms the basis of fundamental legal doctrines such as murder and negligence which incorporate this rule. For example, no homicide may be committed unless a human being is killed, no tort liability is possible unless the interests of a human being are traversed.

Until the middle of the twentieth century the ‘born alive’ rule has been fairly unassailable. Indeed, so much so that within the life matrix of birth and death the overwhelming majority of legal debate focuses upon the question of end of life decisions rather than upon the beginning of life. While areas such as the legality of euthanasia, the creation and enforcement of living wills have been and are still being extensively debated

woman and her unborn child to determine a ‘rights conflict’, where for example, a pregnant woman smokes or drinks during pregnancy to the extent of harming her fetus.

⁷ It is questionable whether such factors can or should be removed from debate, however discussions of positive law theory are beyond the parameters of this paper.

⁸ See also *C v S* [1988] QB 135 at 140; *Attorney-General (Qld) v T* (1983) 57 ALJR 285 at 286.

⁹ For interesting judicial commentary and criticism on the nature and scope of the rule at criminal law see *R v Iby* [2005] NSWCCA 178

in our community it is curious to note that the other end of our lives – when life begins has not received the same attention. A lack of such debate is also surprising given the absence of a universally accepted definition of ‘human being’ provided in Australian cases or legislation nor does such a definition exist in international treaties such as the Universal Declaration of Human Rights¹⁰ nor in legal dictionaries.¹¹

The relative dearth of discussion¹² is highlighted by the plethora of legal responses which have been necessitated by recent biomedical and other technological developments. In light of these development the ‘born alive’ rule is insufficient to inform legal developments. Indeed, as the following discussion illustrates, there has been an escalation in legislation being enacted and interpreted as applicable or not to the unborn. There is also an increase in case law which while not particularly authoritative, is nonetheless notable in dealing with the difficult, complex and novel issues which arise at the forefront of legal development. It is these developments which have thrown into sharp relief the pragmatism of the law in developing a pre-birth continuum.¹³

Patent Law

In 2004 section 18(2) the *Patents Act 1990* (Cth) which states “Human beings, and the biological processes for their generation, are not patentable inventions...” was interpreted in two decisions of the Deputy Commissioner of Patents, Mr D Herald, in *Fertilitescentrum AB and Luminis Pty Ltd* [2004] APO 19 (13 July 2004) and *Woo-Suk Hwang* [2004] APO 24 (9 September 2004). In both cases the patent applications were refused on the basis that the applicants claims related to an attempt to generate a human being.¹⁴ These

¹⁰ It has been argued that international law does envisage human rights protection for the unborn, see the *International Covenant on Civil and Political Rights 1966*: Sentence of death shall not be imposed for crimes committed by persons *below eighteen years of age* and *shall not be carried out on pregnant women*. See Fleming JI, “The Jurisprudence of Abortion Human Rights, the Consensus Gentium and Abortion” Paper given at the First World Congress on Family Law and Children’s Rights, 4-9 July, 1993 Sydney at 508. On the other hand Article 1 of the *Universal Declaration of Human Rights 1948* states “all human beings are born free and equal in dignity and rights”, which means that “persons are recognized in international law, as human beings having been born.”

¹¹ See, eg, *Black’s Law Dictionary* and the *Butterworth Concise Australian Legal Dictionary*.

¹² Notable exceptions include: Naffine N, “Who are Law’s Persons? From Chechire Cats to Responsible Subjects” 66 *The Modern Law Review* 346; Seymour J, “Legal status of the fetus: an international review” (2002) 10 *Journal of Law and Medicine* 28.

¹³ Reflecting the escalation of statutory response to biomedical developments the analysis of legal development is in reverse chronological order.

¹⁴ The limits of the application of the existing regulatory model of the patent legislation to the new issues raised by biomedical developments is made obvious when it is noted that as a consequence of these decisions (and the Research Involving Human Embryos Act 2002 (Cth) and Prohibition of Human Cloning Act 2002 (Cth)) the Australian Patent Office has altered its practice guidelines on the patentability of human beings and biological processes for their generation. These new guidelines exclude from patentability human beings, fetuses, embryos, or fertilised ova or totipotent human cells that are the products of nuclear transfer procedures, and methods of *in vitro* fertilisation or cloning methods which generate human beings, fetuses, embryos, or fertilised ova or totipotent human cells. See also James Cherry, Intellectual Property update, Patent Office decision on nuclear transplantation techniques

http://www.freehills.com.au/publications/publications_1383.asp viewed 24 December 2004

decisions are significant in Australian patent law as they mark the first application of ss18(2)¹⁵.

Fertilitescentrum AB and Luminis Pty Ltd [2004] APO 19 (13 July 2004)

Fertilitescentrum and Luminis Pty Ltd filed a patent application based on a discovery that a substance called 'granulocyte-macrophage colony-stimulating factor' (GM-CSF) which involved growing pre-blastocyst human embryos in a medium containing this new invention, GM-CSF. The basic concept of the invention is that the chemical brings advantages in better simulating the natural environment, and reducing apoptosis of cells in the blastocyst, resulting in greater success in implantation, and babies of greater body mass and having fewer complications compared to IVF babies born without the benefit of the method. The substance is present in the natural environment of the fallopian tube and the invention involves ensuring its presence in an IVF environment.

As filed the application included claims to a culture medium, to a method of growing preblastocyst human embryos, and an IVF program. During examination, the examiner objected to the claims to the method of growing, and the IVF program, as being contrary to the Australian *Patents Act 1990*, in particular to section 18(2).¹⁶ At the hearing, the applicants argued that a human being was generated at fertilisation, and since the claimed method was applied at a later stage, it could not be deemed to be a process for generating a human being. Instead, the applicant argued it was a method of medical treatment¹⁷ of a human being rather than a method of generating a human being which was prohibited by s18(2) of the *Patents Act 1990*.

At first blush subsection 18(2) looks straightforward, however on analysis it states that human beings are not patentable inventions without supplying any definition of what constitutes a 'human being'. Indeed as the Deputy Commissioner states:¹⁸

This section, which superficially looks very simple, has the inherent difficulty of defining the exclusion by reference to 'human beings', without any definition of

¹⁵ Up until this point there was a relatively clear demarcation between inventions encompassed by the exclusion provision in section 18(2) such as totipotent cells or groups of cells that, on their own, develop into a human embryo and inventions which include human beings, fetuses, embryos or fertilised ova and methods of in vitro fertilisation or cloning that generate such things. At the other end of the spectrum, human genes, tissues and cell lines are clearly outside the exclusion provision and are therefore patentable, provided that they meet all other statutory requirements. Inventions involving genetic materials and technologies for which IP Australia has granted patent protection include: synthetic genetic or DNA sequences; mutant forms and fragments of genetic sequences (including polymorphisms); isolated or recombinant DNA coding for a sequence of a gene; proteins expressed by a gene; vectors containing a gene; probes for a gene; methods of transformation using a gene; host cells, higher plants or animals carrying a gene; and recombinant DNA methods—such as polymerase chain reaction (PCR) and novel expression systems see ALRC Report 99 *Genes and Ingenuity: Gene Patenting and Human Health*.

¹⁶ This section interacts with section 107 of the *Patents Act 1990* which provides the Commissioner of Patents power to direct an applicant to amend a specification to remove a lawful ground of objection.

¹⁷ *Bristol Myers Squibb Co v FH Faulding & Co* [1998] 860 FCA

¹⁸ At [12].

what constitutes a 'human being'. Reproductive technology exposes a range of fundamental issues concerning the nature of human life vis-à-vis human beings - issues that are essentially ethical or moral in nature, with no clear scientific answer.

The question posed in *Fertilitescentrum AB and Luminis Pty Ltd* highlights difficulty in drawing a clear line between those inventions within the exclusion provisions and those outside it – when is a human a human being for the purposes of section 18(2) of the *Patents Act 1990*? The omission of the legislation to define human being provided the Deputy Commissioner with an opportunity to reflect and determine what is a 'human being' - the claimed method was excluded from patentability as it was found to be a step along the path of generating a human being, and therefore covered by the exclusion in ss18(2) of the *Patents Act 1990*.

To arrive at this outcome the Deputy Commissioner reflected upon the practical application,¹⁹ the history²⁰ and the interpretation of section 18(2). In determining the correct interpretation of section 18(2) it is noted that the section has the two components: Human beings, and the biological processes for their generation.²¹ The Deputy Commissioner considered the following approaches to interpreting section 18(2):

1. to ask the question – 'at what point in the reproductive process does a human being come into existence?'²²

The Deputy Commissioner notes the fundamental problem with this question is the 'absence of any legislative or agreed societal definition of what constitutes a human being'.

2. to focus upon the 'wrong' that Parliament is addressing (using statutory interpretation techniques).²³

The Deputy Commissioner notes this approach also lacks merit given '...that s.18(2) owes its existence more to political process than to detailed policy deliberation'²⁴ and that

19 The Deputy Commissioner raised 12 broad illustrative questions of the difficulties raised in defining a human being through biomedical technology. Three of these as examples are (1) 'Is there a difference between a human life form, and a human being? Is a human being in full existence in the human life form that exists at fertilisation, or does it entail extra characteristics that are imparted during some part of the gestation (or even after birth)?' (2) 'Is sorting to preferentially select sperm of a particular sex (or other genetic characteristics) part of a process of generating a human being? Is selection of fertilised ovum for implantation, on the basis of (for example) greatest viability or of sex, part of a process of generating a human being? Is genetic treatment of sperm or ovum such that the fertilised ovum will not be affected by a genetic defect, part of the process for generating a human being?' (3) 'In the context of gene therapy, how much 'non-human' DNA can be present in a foetus before it is considered to be non-human?'

²⁰ The Deputy Commissioner review of the history on the late inclusion of ss18(2) into the Patents Act provides a background as to the political intentions during the legislative process in 1990.

²¹ At [26]

²² At [27]

²³ At [29]

²⁴ At [25]

it essentially would replicate the first approach of determining what constitutes a human being.

3. to 'explicitly recognise that there is no agreement about when in the reproductive process a human being comes into existence'²⁵

The third approach, preferred and applied by the Commissioner²⁶ is that for the purposes of section 18(2) the generation of a human being (as distinct from a human life form) occurs over a substantial period of time. The Commissioner notes there must be a start and end point as human life is created at fertilization and ends with full status being obtained upon birth:²⁷

The prohibition of 'human beings' in my view is a prohibition of patenting of any entity that might reasonably claim the status of a human being. Clearly a person that has been born is covered by this exclusion. But to the extent that there is a process of generation of a human being that lasts from fertilisation to birth, I consider that a fertilised ovum and all its subsequent manifestations are covered by this exclusion.

The Deputy Commissioner pinpoints a starting point of human life for the purposes of s18(2), as '...being when the sperm enters the ovum - for at that time the ovum has all it needs to go on and develop as a human being.'²⁸ Following *Fertilitescentrum AB and Luminis Pty Ltd* the prohibition on patenting of 'human beings' extends to the patenting of any entity that might reasonably claim the status of a human being, including a fertilised ovum and all its subsequent manifestations. The parameters of this definition were subsequently explored in the decision on section 18(2) in *Woo-Suk Hwang* [2004] APO 24 (9 September 2004).

Woo-Suk Hwang [2004] APO 24 (9 September 2004)

In this decision the patent application claimed for a method of producing achimeric embryos by employing inter-species nuclear transplantation technique was again refused.²⁹ While this decision again interprets s18(2) the Deputy Commissioner notes two differences between this case and that of *Fertilitescentrum AB and Luminis Pty Ltd* firstly, that there is no step of fertilization and secondly, that the embryo is a hybrid involving both human and bovine (cow ovary) DNA.

The Deputy Commissioner returns to the starting point of a human being developed in *Fertilitescentrum AB and Luminis Pty Ltd* and refines when and what fertilisation for the

²⁵ At [31].

²⁶ At [36].

²⁷ At [37]

²⁸ At [32]

²⁹ Specifically, the embryo is created by transferring the nucleus of a human cell into a bovine ovum, and activating the ovum - the method therefore creates an embryo where the nuclear DNA is human, and the mitochondrial DNA is bovine (a cow).

purposes of human life constitutes for s18(2). He develops fertilisation more broadly to capture the claim made in this application stating:³⁰

In natural reproductive processes, the activation of an ovum arises as a direct result of the fertilisation process. However it is clear that fertilisation by a sperm is not the only way in which an ovum can be activated. In my view, an ovum that has been artificially activated is in principle no different to an ovum that has been fertilised by natural means (noting of course that the DNA content of the ovum will be different.) Accordingly the fact that the claimed method uses postactivation of the ovum does not remove the process from the ambit of s18(2).

This extension of the creation of a human being from natural means to include artificially activated processes is significant. At a practical level as patent law aims to encourage innovation, this decision may limit the new forms of processes which researchers are prepared to embark upon in Australia with respect to assisted reproductive technology and at a theoretical or even theological level it indicates that the notion of 'natural' procreation is not necessary for the creation of a legal human being for the purposes of the *Patent Act 1990*.

A further difference³¹ between this case and *Fertilitescentrum AB and Luminis Pty Ltd* is the presence of non-human DNA. The Deputy Commissioner states:³²

The embryo produced by the claimed process has both human and bovine DNA present. It is clear that the nuclear DNA is intended to be entirely human DNA. The mitochondrial DNA, which essentially is relevant to the energy use of the cell, is entirely bovine. The primary physical characteristics of mammals are governed by the nuclear DNA of the cells. In my view, the presence of the bovine mitochondrial DNA does not take away the essentially human characteristic of the embryo that is determined by the nuclear DNA. That is, the embryo that is produced by this method - while being hybrid - is properly described as human.

Therefore, even though non-human DNA is used in this method the process fell within the exclusion in section 18(2). The distinction drawn was between the human nuclear DNA which would govern the characteristics of this embryo and that of mitochondrial DNA which would not influence the genetic makeup of the resulting being.³³ Due to its generality this finding may be subject to refinement in subsequent cases. A growing body of research indicates that the extent of the contribution of mitochondria in the creation of the human genetic process is unclear. Indeed this research challenges the

³⁰ At [8]

³¹ Significantly *Woo-Suk Hwang* is also the first Australian administrative or judicial decision to discuss the prohibitions on human cloning introduced in the Commonwealth jurisdiction in 2002. This discussion arose through the application of s50(1)(a) of the *Patents Act 1990* which prohibits the grant of a patent for an invention which would be contrary to law. This is a discretionary prohibition where the Commissioner may still issue a patent. The Deputy Commissioner confirmed that the creation of such a hybrid embryo (animal DNA together with human DNA) was prima facie prohibited by section 20 of the Prohibition of Human Cloning Act 2002 and in his opinion would not be allowable under s50 of the *Patents Act 1990*.

³² At [9]

³³ Mitochondria being special parts of a cell found in the cytoplasm which is basically all of the cell except for the nucleus.

assumption that mitochondrial DNA will not influence the genetic makeup of the resulting human being. For example six genetic disorders have been traced to mitochondrial DNA³⁴ indicating that while it is the only non-nuclear constituent of the cell, the fact that it has its own DNA will impact upon the creation of a human being.

Fertilitescentrum AB and Luminis Pty Ltd and *Woo-Suk Hwang* punctuate the point at which society has crossed the threshold of requiring a legal position³⁵ on the definition of a human being. As biotechnology, especially biomedical biotechnology, is becoming the new economic force in the knowledge economy³⁶ it is not surprising that in Australia the threshold issue as to defining the exact moment that a human life begins has been initially examined and observations made by the Patents Office for the purposes of the *Patents Act 1990* (Cth). Unsurprising as the purpose of issuing patents is to encourage innovation, a patent being the primary commercial vehicle for the grant and protection of an intellectual property right by the State to the inventor of a new, inventive and useful product or process.³⁷

By way of creating a pre-birth continuum, the decisions of the Patent Office are of course specific to the governing legislation of the *Patents Act 1990*. Within this specific legal context the decisions create a legal concept as to when for the purposes of s18(2) 'Human beings, and the biological processes for their generation..' occur in law. The fact that the law recognizes an entity is highlighted as the point at which a legal non-entity ceases to be and an entity is created differs between the two cases. *Fertilitescentrum AB and Luminis Pty Ltd* identifies that the biological process of generating a 'human being' begins '... when the sperm enters the ovum - for at that time the ovum has all it needs to go on and develop as a human being'.³⁸ In *Woo-Suk Hwang* this process takes place artificially. The law will therefore respond to science and other disciplines and belief systems such as religion and morality within its own normative framework for, as Curtis states:³⁹

... one common assertion is that life begins at conception. But, when, exactly does conception occur? Does it occur when the sperm cell begins to traverse the zona pellucida of the egg, or when the sperm's acrosome releases its enzymes, allowing the sperm to touch the plasma membrane of the egg? ... Paternal and maternal genes remain separate and distinct for 24 hours after entrance of the sperm into the oocyte's

³⁴ Randall T, "Mitochondrial DNA: A new frontier in acquired and inborn gene defects" (1991) 266 *Journal of the American Medical Association* 1739. For a more current report see the Mitochondrial Human Genome Report at <http://www.mitomap.org/report.html> viewed 1 May 2006.

³⁵ These decisions are essentially administrative in nature but have been described as 'quasi-judicial'.

³⁶ See the Australian Biotechnology Report 2001, Ernst and Young 2001, *The Australian Biotechnology Report 2001*, [http://www.ey.com/global/Content.nsf/Australia/Australian Biotechnology Report 2001](http://www.ey.com/global/Content.nsf/Australia/Australian%20Biotechnology%20Report%202001) viewed 15 April 2006, in 2003 the UK House of Commons Trade and Industry Committee Report on Biotechnology, 2003, writes of the Australian biotechnology industry "In Australia... total revenues among publicly traded companies increased 38 per cent from \$666 million in 2001 to \$920 million in 2002. The number of ... people employed in the industry jumped 24 % from 5,201 to 6,464."

³⁷ In Australia an invention will be patentable if it is a 'manner of manufacture' within the meaning of s 6 of the *Statute of Monopolies*; is novel; involves an inventive or innovative step; is useful; and has not been used secretly within Australia prior to filing the patent.

³⁸ At [32]

³⁹ Curtis MG, "Cloning and Stem Cells: Processes, Politics and Policy" *Current Women's Health Reports* 3 at 492

cytoplasm and another 24 to 36 hours pass before the combination of the two genetic pools actually begins to direct cell function. Does conception begin when they simply fuse or when the fused nuclei become functional as a unit? It is clear that despite the scientific knowledge about the orderly steps of fertilization and early human reproduction, the 'simple' assertion that life begins at conception is fraught with complexities, and scientific knowledge fails to provide a defining boundary of when, exactly, conception occurs.

Law therefore departs from science. The area of patent law creates its own legal conceptions of a human being, determining its own reference points for conception and processes for generating human beings. The concept of humanness is a continuum for as Commissioner Herald states in *Fertilitescentrum AB and Luminis Pty Ltd* the '...process of generation of a human being lasts from fertilisation to birth'.⁴⁰

Cloning

Cloning again sees the biological status of the fetus translated into a legislative status. As with the decisions on patents, the cloning legislation introduced in all Australian jurisdictions in 2002/2003 is a recent development.

The cloning legislation implements definitions of embryo and fetus not formerly prescribed in law. For example section 4 of the *Human Cloning And Other Prohibited Practices Act 2003* (NSW) defines a human embryo as:

...a live embryo that has a human genome or an altered human genome and that has been developing for less than 8 weeks since the appearance of 2 pro-nuclei or the initiation of its development by other means.

This broad definition reflects the understanding of an organism which develops from fertilisation until 8 weeks when it no longer is an embryo for the purpose of the cloning legislation. At 8 weeks it becomes a fetus.

Similarly to patent law, the legal regulation of cloning starkly exposes the law coming to terms with the use of human embryos in biomedical innovation. Cloning is an area where science has moved past the point of even needing the law to locate and/or define rights between the pregnant mother and the unborn child. In the words of McLachlin J, as her Ladyship then was, in the Supreme Court of Canada decision in *Winnipeg Child & Family Services (Northwest Area) v G* [1997] 3 SCR 925 delivering the judgment of the majority at [12] – '[T]he issue is not one of biological status, nor indeed spiritual status, but of legal status.'

⁴⁰ At [37]

The recognition of a pre-birth continuum which lasts from pre-fertilization to birth is to recognize not only that the law develops independently of medicine, morality or ethics to define the legal status of a fetus, but also to identify that legal status is itself not a universal concept, that:

- (1) there is no precise, scientific definition of an embryo meaning the law creates its own legal requirements⁴¹ – as the recent Lockhart review on cloning states ‘[D]evelopments in Assisted Reproductive Technology over the past three decades have made it more important to provide an adequate biological and legal definition of an embryo.’⁴²
- (2) there is variance in legal terminology. In direct contradiction with the above definition - at common law the term foetus is used to describe a child in utero as young as 3½ weeks.⁴³ Such variance in legal terminologies may be rationalized through a pre-birth continuum, by acknowledging that areas of law develop in isolation akin to legal silos with each creating its own recognition of the developing entity upon a lineal time-line.

Infertility Statutes

Three states have specific legislation governing the provision of assisted reproductive technologies – South Australia, Victoria and Western Australia. The legislation in each jurisdiction is not uniform however all these States broadly regulate the provision, use and information pertaining to services such as in vitro fertilization.

The *Victorian Infertility Treatment Act 1995* and the *South Australian Reproductive Technology (Code of Ethical Practice) Regulations 1995* use the same definition for a human embryo as the cloning legislation. Section 3 states:

"human embryo" means a live embryo that has a human genome or an altered human genome and that has been developing for less than 8 weeks since the appearance of 2 pro-nuclei or the initiation of its development by other means;

⁴¹ Indeed, even within a discrete legal area, definitions are fluid. For example, in 2005 the Lockhart review which was a report on the *Federal Prohibition of Human Cloning Act 2002* and the *Research Involving Human Embryos Act 2002* states that an embryo, for the purposes of cloning, should be defined as:

...a discrete living entity that has a human genome or an altered human genome and that has arisen from either:

- (i) the first mitotic cell division when fertilization of a human oocyte by a human sperm is complete; or
- (ii) any other process that initiates organized development of a biological entity with a human nuclear genome or altered human nuclear genome that has the potential to develop up to, or beyond, 14 days

and has not yet reached eight weeks of development.

This new definition is seen as being a more accurate reflection of medical understanding as to the beginning of an embryo as it encompasses the two ways of making an embryo.

⁴² The Lockhart report is available at <http://www.lockhartreview.com.au/> viewed 1 June 2006, this comment comes from page 89.

⁴³ *Jones v Harris & Anor* (Supreme Court of NSW, CA 40653/94, 10 December 1997)

In Western Australia the *Human Reproductive Technology Act 1991* section 3 states

“**embryo**” means a live human embryo, in the stage of development which occurs from —

(a) the completion of the fertilisation of the egg; or

(b) the initiation of parthenogenesis,

to the time when, excluding any period of storage, 7 completed weeks of the development have occurred;

It is noteworthy then that in terms of a pre-birth continuum the above Western Australian definition departs from the other jurisdictions. This highlights that the pre-birth continuum must not just refer to areas of law but also to jurisdictions as within an area of law jurisdictional differences will impact upon the recognition of the fetus.

The Law of Torts

At common law an unborn child has no ability to commence an action in tort (assuming proceedings would be brought by a parent or other guardian in a representative capacity) because of the operation of the ‘born alive rule’. But if injured in utero and subsequently born suffering damage as a result of that injury, then upon birth the child attains the right to sue in tort in respect of the in utero injury.

The significance of the position of the unborn child in tort is that as a matter of law, a ‘potential’ duty of care (in the tort of negligence) can be owed to a child in utero (or even a child yet to be conceived), that duty can be breached whilst the child is in utero (or even before conception) and damage can be occasioned whilst the child is in utero. But, it is not until the child is born, suffering damage, that there is an actionable wrong. The duty of care “crystallizes” upon the birth of the injured child. Clearly the law recognizes the rights of the unborn not to be injured but it postpones the completion of the cause of action and the right to recover until after birth.

The well known decision of the Full Court of the Victorian Supreme Court in *Watt v Rama* (1972) VR 353 has long been accepted as a correct statement of Australian law on the issue of the recognition of the unborn in the tort of negligence⁴⁴. In that case the plaintiff was born suffering brain damage and epilepsy as a result of a motor accident in which the plaintiff’s mother, whilst pregnant with the plaintiff, was rendered quadriplegic. The collision was caused by the negligence of the defendant. There was in 1972, surprisingly, no English or Australian authority directly on whether a child “born with injuries caused by the pre-natal neglect of the defendant has a cause of action in negligence against him in respect of such injuries”.⁴⁵ The court considered the

⁴⁴ *Watt v Rama* was accepted in NSW by the Court of Appeal in *Lynch v Lynch* (1991) 25 NSWLR 411; It has been referred to and approved by the High Court on several occasions (eg: *Cattanach v Melchior* [2003] HCA 38) most recently in *Harriton v Stephens*; *Waller v James* [2006] HCA. *Watt v Rama* was also followed in England in *B v Islington Health Authority* (1991) 1 All ER 825 and *Martell v Merton and Sutton Health Authority* (1992) 3 All ER 820.

⁴⁵ *Watt v Rama* (1972) VR 353 at 358

requirements for a duty of care in the tort of negligence, in particular the requirement of reasonable foreseeability of the plaintiff and held that pregnant women in cars are reasonably foreseeable as is the possibility of injury, on birth, to their unborn children. The court pointed out that the cause of action in negligence is not complete without damage to the plaintiff, so that in the case of a child in utero, the tort is complete only at birth, when the child is born suffering damage caused by the defendant's negligence.

It was held that:⁴⁶

...where the injury does not occur contemporaneously with the act or neglect, the relationship will not necessarily crystallize so as to create a duty at the time of the act or neglect. Where the injury to the plaintiff occurs only subsequently to the time of the act or neglect in circumstances where the plaintiff is not defined at that time, as for example where he is only one of a class, the relationship and the duty to arise therefrom may be said to be contingent or potential but capable of ripening into a relationship imposing a duty when the plaintiff becomes defined.

So, using the language of the court in *Watt v Rama*, the plaintiff in these cases becomes "defined" at birth and the relationship between plaintiff and defendant, creating the duty of care, "ripens" at that moment. The court did not see the issue as one requiring any departure from the 'born alive' rule or the use of any fiction to 'deem' the plaintiff to have been 'alive' at the time of the defendant's negligent act. Rather, the court looked to the *elements* of the tort of negligence taking the view that the last element, the damage, did not eventuate until the plaintiff's birth in a damaged state. It is significant however that the court took the view that the unborn child who might subsequently be born suffering damage, was reasonably foreseeable as a member of a class of persons who might be injured by the defendant's negligence.

Watt v Rama was applied by the NSW Court of Appeal in *Lynch v Lynch* (1991) 25 NSWLR 411, to impose a duty of care on a mother to her own child who was born injured as a result of a car crash caused by the mother's negligent driving. The court was keen to confine the mother's duty to her unborn child to the situation of negligent driving so as not to make a mother liable to her child for other acts during pregnancy. *Lynch v Lynch* was approved and applied in the Queensland decision in *Bowditch v McEwan* (2002) 36 MVR 235, and again, the court specifically limited the duty owed by the mother to her child to the case of her driving rather than other maternal conduct⁴⁷.

In *X v Pal* (1991) 23 NSWLR 26 the NSW Court of Appeal decided that a child who was *not conceived* at the date of the defendant's negligent act could acquire rights on birth, to sue in the tort of negligence. In this case the plaintiff was born with syphilis having been infected by her mother who was unaware that she carried the disease. The mother had previously been pregnant and her treating doctors at that time had failed to screen her for the disease during that earlier pregnancy. Had they done so, they would have discovered

⁴⁶ Per Winneke CJ & Pape J at p. 359.

⁴⁷ The Supreme Court of Canada refused to impose a duty of care on a mother in a similar case in *Dobson v Dobson* (1999) 174 DLR (4th) 1 for policy reasons, see Malkin I, "A Mother's Duty of Care to her Foetus While Driving: A Comment on *Dobson v Dobson* (and *Lynch v Lynch*)" (2001) 9 Torts Law Journal 109.

the mother's illness and treated her for it, thereby avoiding the risk to the plaintiff before the plaintiff's conception.

Clarke JA held that "a person may be subjected to a duty of care to a child who was neither born nor conceived at the time of his careless acts or omissions".⁴⁸ His Honour found this proposition "entirely consistent with what was said by the High Court...in *Chapman v Hearse*..." regarding the requirement of reasonable foreseeability of the plaintiff.

Clarke JA stated⁴⁹:

If one postulates the duty in terms of the class or category of persons to whom it is owed, as I believe one should, and accepts that there may be within that class persons who are not born when the careless conduct occurs there is no need to resort to artificial concepts, such as deeming, or to be unduly troubled about the child's lack of legal personality at the time of that conduct.

His Honour further stated⁵⁰:

The fact that damage was suffered many years after the breach of duty has never been regarded as an impediment to the cause of action. Nor should, in my view, the fact that a particular plaintiff acquired legal personality (and suffered damage) years after the breach.

The same approach was adopted in *Kosky & Another v The Trustees of the Sisters of Charity* [1982] VR 961 where Tadgell J in an application for an extension of the time in which to bring proceedings, took the view that a child was owed a duty of care by a hospital in respect of a blood transfusion given to the mother 8 years before the child's birth.

Clearly the law of tort recognizes the rights of the unborn not to be injured and provides a remedy, after birth, for harm occurring before birth caused by negligent acts before birth or even before conception. Tort law does this not by recognizing the existence of a 'legal person' before birth, but certainly it recognises that a child in utero can be the victim of a negligent act and that a child in utero, or even before conception is one of a class of reasonably foreseeable persons. Tort law sees and adopts the whole of the pre-birth continuum, at least for the purposes of determining reasonable foreseeability of a plaintiff.

Succession and Equity and Trusts

⁴⁸ *X v Pal* (1991) 23 NSWLR 26 at 41

⁴⁹ *X v Pal* (1991) 23 NSWLR 26 at 38

⁵⁰ *X v Pal* (1991) 23 NSWLR 26 at 38

Equity and trust law has always acknowledged the existence of unborn children. Many of the cases discussed in other categories in this article such as those seeking injunctions are of course seeking equitable remedies. As stated in *Yunnghams v Candoora No 19 Pty Ltd* BC9908449 (discussed below) by Justice Gillard:⁵¹ '[T]he courts of equity have over many years responded to the need and often interfere to protect contingent rights before birth.' His Honour continued '[N]o civilised legal system which is fair and just could permit the destruction or interference with the rights of the unborn to acquire an interest in property upon birth and survival, prior to the child becoming a legal person to protect its own rights.'⁵²

Traditionally the "born alive" rule has not prevented a child who was in utero at the death of a testator, or at the date of commencement of a trust, from taking a benefit to which he or she would have been entitled if living at the relevant date. Such a child when born, subsequently, would be entitled to a share in the trust or estate. The courts have for many years been prepared to recognize an "exception" to the traditional common law 'born alive' rule so as to enable the share of an unborn child in an estate or trust to take effect at birth *as if the child had been born at the relevant date*. The courts have had no hesitation in making orders to include in the class of beneficiaries entitled under a will or trust, children who were '*en ventre sa mere*' at the date the testamentary or trust benefit took effect, if they would have been so entitled, if living (ie: if already born) at that date. The courts have done so by applying a rule that apparently recognizes a form of *contingent existence* or *deemed existence*, prior to birth. Clearly the courts have recognized that the child in utero is an entity deserving of protection and the issue of the state of development of the fetus (its place in the pre-birth continuum) has not arisen until relatively recently.

Sir John Salmond states in the 1937 (9th) edition⁵³ of his work:

Though the dead possess no legal personality, it is otherwise with the unborn. There is nothing in law to prevent a man from owning property before he is born. His ownership is necessarily contingent, indeed, for he may never be born at all; but it is nonetheless a real and present ownership. A man may settle property upon his wife and the children to be born of her.

He wrote further:

The rights of an unborn person, whether proprietary or personal, are all contingent on his birth as a living human being. The legal personality attributed to him by way of anticipation falls away ab initio if he never takes his place among the living...A posthumous child may inherit; but if he dies in the womb, or is stillborn, his inheritance fails to take effect, and no one can claim through him, though it would be otherwise if he lived an hour after his birth. (at p 424)

⁵¹ At [115].

⁵² At [114].

⁵³ Sir John Salmond, *Jurisprudence*, 9th ed, Sweet & Maxwell, London 1937, at 422.

There is very old authority that recognizes that the law employs a *fiction* when recognizing the property rights of the unborn. In *Wallis v Hodson* (1724) 2 Atk. 117; 26 ER 472, Lord Hardwick stated the following rule:

The plaintiff was *en ventre sa mere* ... and is consequently a person in rerum natura so that both by the rules of the common law and civil law she was *to all intents and purposes* a child. (italics added).

Lord Westbury LC recognized such a rule in *Blasson v Blasson* (1864) 2 De GJ and S 665; 46 ER 534:

It is, however, material to observe that the *fiction or indulgence* of the law which treats the unborn child as actually born applies only for the purpose of enabling the unborn child to take a benefit which, if born, it would be entitled to... (italics added).

In the twentieth century⁵⁴, the House of Lords considered the issue in *Villar v Gilbey* (1907) AC 139 and again in *Elliott v Lord Joicey* (1935) AC 209 where their Lordships confirmed a rule that unborn children could be included in the class of children living at the date of their father's death and held that such a rule was justified:

...on the ground that such children came within the motive and reason of the gift and should therefore be included *by fiction or indulgence on the ground that it was for their benefit*. (*Villar v Gilbey* at p. 144) (Italics added).

These authorities were approved and applied by Gillard J in the Victorian Supreme Court in *Yunghanns v Candoora No 19 Pty Ltd* ([1999]VSC 524 (15 December 1999)). But this case was different from the old authorities in that it involved a proceeding at a time when the child remained unborn, in respect of an interest that could not exist till the birth of the child. The earlier cases concerned applications on behalf of living children who had been 'en ventre sa mere' at the time of a testator's death or the creation of a trust.

The *Yunghanns* case concerned an application for an interlocutory injunction to restrain the trustee of an *inter vivos* trust from acting so as to exclude an unborn child as a beneficiary. The issue before the court was whether the father of the unborn child had any standing to bring the proceedings (*whilst the child remained unborn*) and whether the unborn child had any interest which could be protected *before* its birth. The Court concluded on the authorities, that the rights of the unborn child could be protected by the

⁵⁴ For discussion of the early authorities see Barry, JV "The Child *en ventre sa mere*", (1941) 14 the Australia Law Journal 351 and Winfield, P.H. "The unborn child" (1944) 8 Cambridge LJ 76. Australian authorities include *Trustees Executors and Agency Co Ltd v Sleeman* (1899) 25 VLR 187; *In re Bruce* [1979] Tas SR 110; *Permanent Trustees Co of NSW v Ralfe* (1940) 57 WN (NSW) 183; *V v G* [1980] 2 NSWLR 366; *Re Lawrence* [1973] Qd R 201.

issue of an injunction and that the child's father, in a representative capacity, could be a party to an action for that purpose. Gillard J stated:⁵⁵

The law has from very early times treated the foetus *as a child* in some circumstances. This has been in the area of protecting the unborn child's right to property. The foetus is *treated by a legal fiction as having already been born*. (italics added).

It was argued in *Yunghanns* that the action must fail because the child was not a legal person at the time of the proceedings and had no rights which could be enforced prior to birth. In support of this argument, two authorities were relied upon, one English, one Australian. Both were cases dealing with an application by a father for an order restraining the mother of a fetus from having an abortion. In the English case of *Paton v B.P.A.S. Trustees* (1979) 1QB 276, the court held that the application must fail because a fetus could have no rights whatsoever till born and having an existence separate from its mother: the 'born alive' rule⁵⁶.

In the Australian case of *Attorney General (Qld) (ex rel Kerr) v T* (1983) 57 ALJR 285, at 277 Gibbs CJ in the High Court held to the same effect:

...a foetus has no right of its own until it is born and has a separate existence from its mother. We are here, of course, not concerned with the questions that arise where damage to a foetus results in the birth of a damaged child, or with those cases in which a will is given a fictional construction, to give effect to the reasons and motives of the dispositions of the testator.

The court in *Yunghanns* distinguished both the English authority of *Paton* ((1979) 1 QB 276) and the Australian High Court authority in *Attorney General (Qld) (ex rel Kerr) v T*. The basis of the distinction is that in a succession case, the orders which the court would make are to protect a right which an unborn child will attain *at birth* (*Yunghanns* at para 110), whereas in the 'abortion' cases the courts were considering a situation where the fetus could have no rights which could be enforced because there was never any intention or contemplation that the fetus would *ever be born*. The distinction seems to rest entirely on the issue of whether there is any possibility or likelihood that a child will be born: essentially whether the '*contingent existence*' can ever become reality. Indeed, in *Paton* Sir George Baker stated at 279:

...the fetus has no right of action, no right at all, until birth. The succession cases have been mentioned. There is no difference. From conception the child, may have succession rights by what has been called 'fictional construction'; but the child must be subsequently born alive.

⁵⁵ At [116].

⁵⁶ Cited with approval in *C v S* (1988) 1 QB 135; *In Re F (in utero)* (1988) Fam. 122; *B v Islington* (1991) 1 QB 638; *DeMartell v Merton* (1993) QB 204; *Burton v Islington* (1993) QB 204

A case which adds an entirely new dimension to the traditional “succession” cases involving the question of the rights of children ‘*en ventre sa mere*’, is the Tasmanian Supreme Court decision *In The matter of the Estate of the Late K; ex parte: The Public Trustee* (Unreported, Supreme Court of Tasmania, Spicer J. 22 April 1996.)⁵⁷

In that case the Public trustee as administrator of an intestate estate, sought a declaratory order as to whether two frozen embryos (*zygotes* in strict scientific terms) produced (prior to decease), using the sperm of the deceased and ova of his widow, were ‘issue’ pursuant to the relevant Tasmanian legislation dealing with distribution on intestacy. The deceased and his widow already had one child born by the IVF technique and they had intended to have the two frozen embryos implanted with a view to a further pregnancy and birth, but the deceased died prematurely.

Three questions were put to the court: were the embryos ‘issue’ of the deceased for the purpose of the relevant Tasmanian succession legislation, were they living at the date of death and would they become children of the deceased upon being born alive? Spicer J reviewed the law concerning succession and the position of children *en ventre sa mere* at the time of a testator’s death. He concluded that the law had long recognised such a child as ‘born’ for the purpose of succession. His Honour made the observation that:

The recognition of the rights of an unborn child is an artificial construction or fiction based on the proposition that a child *en ventre sa mere*, is deemed to be born at the time of an occurrence so far as it is necessary for the benefit of that child.

The Court held that the embryos were not ‘*issue*’ of the deceased *at the time of death* nor were they ‘*alive*’ at the time of their father’s death. This was on the basis that ‘there was no human in existence’ at the time of the death of the deceased. This conclusion was based on the traditional ‘born alive’ rule.

But the court answered the final question in the affirmative. For the purposes of succession, the embryos would become children of the deceased upon their being born alive. Spicer J asked:

As a matter of policy, should the law distinguish between a child, *en ventre sa mere*, and his or her sibling who was at the same time a frozen embryo?...Should a right by way of the application of a legal fiction be denied because medicine and technology have overtaken the circumstances existent in the 19th century when the legal fiction was applied?

After reviewing the reports of various Law Reform Commissions⁵⁸ on the issue of the status of posthumously conceived children or children born from stored embryos, Spicer

⁵⁷ See also Clarke D, “En Ventre Sa Frigidaire: Zygotes as Children” (1996) 21 Alternative Law Journal 165.

⁵⁸ NSW LRC Report 49, 1986 at 81; NSW LRC In Vitro Fertilisation Law Reform Commission 58, 1988; Report of the Committee of Inquiry into Human Fertilisation and Embryology (HMSO Cmnd 9314

J noted that several legislatures had denied succession rights to such children on pragmatic grounds because of the practical difficulties that would arise for executors and administrators of deceased estates. His Honour concluded however, that such practical difficulties should not fetter His court and held:

If a child en ventre sa mere is not regarded as living (in terms of law) but has a contingent interest dependent on birth, then in logic the same status should be afforded an embryo. That would be so whether or not two cells, four cells, or a developed foetus was existent. In this case fertilization has occurred and, although in stasis, possesses a potential for live birth. If such be the case then it could be said to possess the same contingent rights as a sibling, en ventre sa mere.

This decision highlights that settled areas of law are able to incorporate biomedical developments such as the freezing of embryos into the pre-birth continuum. Further the decision illustrates that the pre-birth continuum is not necessarily reliant upon the growth or development of a fetus.

***The parens patriae* decisions: can an unborn child be made a ward of the court?**

Traditionally the courts have applied the “born alive” rule to refuse ‘protection’ or ‘guardianship’ orders in respect of unborn children. At common law, it seems that the “*parens patriae*” jurisdiction of the court cannot be relied upon to make an unborn child a ward of the court.

The position seems certain in Australia having regard to the decision discussed earlier of Gibbs CJ in the High Court in *Attorney General (QLD) (Ex rel KERR) v T* (1983) 46 ALR 275 where His Honour held that an unborn child is not a *person* whose existence can be protected by the court in its role as *parens patriae*. His Honour cited and approved the judgment of Sir George Baker P in *Paton v BPAS Trustees* [1979] 1 QB 276 at 279 where the ‘born alive’ rule was relied upon.

Similarly, the English Court of Appeal in *Re F (in utero)* [1988] 2 WLR 1288 held that it had no jurisdiction to make a child in utero a ward of the court. That case concerned an application in respect of the unborn child of a mentally ill woman who led a nomadic existence and who, the relevant social worker feared, would not attend hospital or obtain other assistance for the birth of her child.

Whilst the decision was unanimous, the Justices in *Re F* arrived at their conclusions by slightly different considerations. May LJ relied on the traditional ‘born alive’ rule. His Lordship also considered that a wardship order would inevitably create a conflict between the legal rights of the mother and the inchoate rights of the unborn child. Balcombe LJ took a similar view relying on the notion that an unborn child has no existence separate from its mother. Staughton LJ held that because the life of the fetus could not be regarded

London, 1984; cf Ontario Law Reform Commission Report on Human Artificial Reproduction & Related Matters Vols 1 & 2, 1985 at 182)

in isolation from that of the pregnant mother and because an unborn child could not physically be cared for by any person until it was born, the court should not assume jurisdiction. His Lordship further held that it was for parliament not the courts to create a jurisdiction in this type of case.

The Canadian Supreme Court (Full Court) decision in *Winnipeg Child & Family Services (Northwest Area) v G* ((1996) 152 DLR (4th) 193) by majority took the House of Lords view that an unborn child was not a legal person and could not therefore be protected under the *parens patriae* jurisdiction of the court. The dissenting judgment however, held at 227 that the 'born alive' rule "is a common law evidentiary presumption rooted in rudimentary medical knowledge that has long since been overtaken by modern science"...

The High Court of New Zealand has however taken a view of the issue based on different considerations. In *Re an Unborn Child* [2003] 1 NZLR 115 Heath J held that a guardianship order should be made in respect of a child then in utero with the order to take effect immediately. The mother of the child was appointed "agent of the court" for the purposes of the guardianship.

National television in NZ had broadcast a piece about a pornographic film to be made featuring the birth of a child whose mother was also to 'star' in the film. The chief social worker for the Department of Child, Youth and Family Services had grave concerns about the welfare of the child and applied to the court for orders placing the unborn child under the guardianship of the court and prohibiting the filming and publication of the birth of the child in any pornographic publication.

The issue of guardianship and wardship jurisdiction is governed in New Zealand by ss 10A - 10E of the *Guardianship Act 1968 (NZ)*. Heath J held that the statute was not intended to supersede the inherent jurisdiction⁵⁹ of the Court based on *parens patriae*, though it would be rare that parties would need to resort to the inherent jurisdiction given the scheme in the relevant legislation. Heath J held that an unborn child is a 'child' within the legislation (defined as a "person under the age of 20 years") and that therefore it was unnecessary to rely on the inherent jurisdiction of the court.

In concluding that the definition of child in the Act included an unborn child, Heath J considered several authorities including the English Court of Appeal decision in *Re F (in utero)*. His Honour considered that that case was not applicable in New Zealand because there were significant differences in the New Zealand position which required a different approach and which required *Re F (in utero)* to be distinguished. Those were:⁶⁰

⁵⁹ In *Pallin v Department of Social Welfare* [1983] NZLR 266 (CA) it was held that the High Court had a residual jurisdiction "to take care of those who are not able to take care of themselves" per Cooke J at p 272; In *MvM* [1983] NZLR 502 (CA) Woodhouse P recognised the Court's jurisdiction stemming from "the role of the Crown as *parens patriae*.." at 506.

⁶⁰ At [61].

1. The adoption and ratification by NZ of the UN Convention on the Rights of the Child which “expressly recognizes the creation of rights in a child at a time before birth”
2. In the present case the Court would be making an order *restraining* the child’s mother from doing something rather than a *mandatory* order requiring the mother to act against her will
3. Other NZ legislation protects the interests of unborn children (ss 182 & 187 *Crimes Act* 1961 and the *Contraception, Sterilisation and Abortion Act* 1977).

Heath J concluded⁶¹ that “having regard to the international obligations which have been assumed by New Zealand under the convention, and the other provisions of New Zealand law which support the interests of unborn children, I hold that the term “child”can include an unborn child”.

In support of this conclusion, His Honour referred to the House of Lords’ considerations in *Attorney Generals Reference (No 3 of 1994)* [1997] 3 WLR 421 where their Lordships addressed the issue of whether a fetus has a human personality distinct from its mother. Lord Mustill stated at 429 that “the mother and the foetus [are] two distinct organisms.. .’ and Lord Hope of Craigend said (at p 440) “the embryo is in reality a separate organism from its mother from the moment of its conception”. Further, Heath J points out, the approach of the House of Lords had already been adopted by the Full Court of the NZ High Court in an appeal from the Complaints Review Tribunal under the *Health and Disability Commissioner Act* 1994⁶².

The court concluded in *Re an Unborn Child* on the basis that the best interests of the child were the paramount consideration, that there was a likely risk of emotional harm to the child arising out of sexual exploitation of the child’s image and that therefore the guardianship order should be made.

The New Zealand Family Court had considered the same issue previously in *In the matter of Baby P (an Unborn child)* [1995] NZFLR 577 which concerned an application for a care and protection order (under s 14 *Children, Young Persons and Their Families Act* (NZ) 1989) in respect of an unborn child whose birth was imminent. In that case, Inglis J reached the surprising (given the then state of the authorities) conclusion that the late term unborn child was:

a young human being....Medically and physiologically there is only a minor, if not imperceptible , difference between his present stage of development and the stage he will be immediately after his birth...Baby P has all the characteristics of independent human personality (at p. 578).

Heath J in *Re an Unborn Child* declined to follow the reasoning in the *Baby P* case noting that the decision had been criticized on several grounds⁶³, most significantly that

⁶¹ At [63].

⁶² High Court, Wellington, AP 301/01, 22 April 2002, Wild & Ronald Young JJ.

⁶³ “Unborn Children: Persons and Maternal Conduct” [1997] 5 Med L Rev 143

there was a risk of conflict between the mother's interests and those of the child, where the order would have the effect of mandating the mother's pre-natal conduct. Heath J further held that the decision in *Baby P* was flawed firstly, because the Judge saw the issue of whether to exercise power in respect of an unborn child, as discretionary rather than jurisdictional and secondly, because the view that an unborn child is sufficiently developed to be to be a "young human being" was apparently based on the Judge's own personal view of what constitutes sufficient development.

The New Zealand decision in *Re an Unborn Child* is of interest to Australian lawyers because the main considerations, on which the decision was based, are also applicable in Australia. Australia is a signatory to the UN Convention on the Rights of the Child⁶⁴, and there is legislation in various Australian states protecting the rights of unborn children⁶⁵. The unusual facts of *Re an Unborn Child* involved considerations very different from those in the 'abortion' case of *Attorney General (QLD) (Ex rel Kerr) v T*, which is the leading Australian authority on the point. It may be that there is scope to argue in Australia, that there are circumstances where it would be appropriate for the Courts to consider making a guardianship order in respect of an unborn child, notwithstanding the traditional 'born alive' rule.

Contracts

The common law of contracts has not had to address the issue of the unborn, at least in the sense that there is no doubt the unborn cannot be parties to contracts. Commercial surrogacy contracts which would certainly have a bearing as to the rights and welfare of the unborn are generally considered to be against public policy at common law.⁶⁶

The only area of Australian contract law which crosses into the pre-birth continuum is the statutory regulation of surrogacy agreements. The *Surrogate Parenthood Act 1988* (Qld) prohibits surrogacy arrangements and prevents contracts which are prescribed contracts which are defined as:

a contract, agreement or arrangement made between 2 or more persons, whether formally or informally and whether or not for payment or reward, under which it is agreed--

- (a) that a person shall become or shall seek or attempt to become the bearer of a child and that a child delivered as the result thereof shall become and be treated, whether by adoption, agreement or otherwise, as the child of any person or persons other than the person firstmentioned in this paragraph; or
- (b) that a child delivered from a person who is the bearer of any embryo, foetus or child at the time when the prescribed contract is made shall become

⁶⁴ The Convention was ratified by Australia on 17 December, 1990 and came into force for Australia on 16th January 1991.

⁶⁵ See note 78 below; s.21A *Child Protection Act* (Qld) 1999; s.25 *Children and Young Persons (Care and Protection) Act* (NSW) 1998.

⁶⁶ *Halsbury's Laws of England* refers to the public policy principle which would prohibit contracts for the buying and selling of children.

and be treated, whether by adoption, agreement or otherwise, as the child of any person or persons other than the person first mentioned in this paragraph.

Paragraph (b) above specifically refers to a foetus or embryo however the legislation does not define these terms. Equivalent state legislation does not contain any mention of the embryo or foetus.

Criminal

In criminal law there is no homicide unless a human being is killed.⁶⁷ If an unborn child is not a human being there can be no homicide. Indeed in *Attorney-General (Qld) (Ex rel Kerr) v T* (1983) 57 ALJR 285 referred to earlier, the High Court refused to intervene to prevent an abortion. The common law recognizes that the fetus will become a child upon birth while at the same time denying the fetus the legal status of a human until it is born.⁶⁸

The key to the approach of the criminal law to a fetus is its regulation of abortion. There are three broad categories of abortion laws in Australia which make it a crime to seek, perform or otherwise be involved in an abortion.⁶⁹ These are:

- (a) laws that create the crime of 'unlawful abortion'
- (b) laws that create the crime of 'child destruction' and
- (c) the law of homicide.

The demarcation between these crimes rests in the progressive stages of the pregnancy. In practice abortion is available in most Australian jurisdictions up to 20 weeks of pregnancy.⁷⁰

(a) laws that create the crime of 'unlawful abortion'

Very generally⁷¹ the laws that create the crime of unlawful abortion make it an offence to procure the death of the fetus unless there is an element of necessity that may affect the life of the mother or the fetus. The offences relate to intended self-abortion, intended procurement of a miscarriage of another and the knowing supply of instruments, drugs or

⁶⁷ At common law this requirement was expressed as the need for a 'reasonable creature in being'. The International Covenant on Civil and Political Rights 1966 art 6 para 1 uses the words 'human being' which have been said to mean 'person in being' therefore the international human rights rules do not apply to abortions.

⁶⁸ See also Fortin JES, "Legal protection for the unborn child" (1988) 51 Modern Law Review 55.

⁶⁹ For an excellent overview of Australian abortion laws see Cica N, "Abortion Law in Australia" *Research Paper 1 1998-99*, Parliament of Australia www.apph.gov.au/library/pubs/rp/1998-99/99rp01.htm viewed 29 March 2006

⁷⁰ See http://beta.austlii.edu.au/au/other/liac/hot_topic/hottopic/2000/5/9.html viewed 30 March 2006

⁷¹ Some Australian jurisdictions no longer have a crime of abortion see for example the ACT which has removed abortion from criminal law.

other noxious substances designed to assist in the first two offences.⁷² The statutory operation of each of these crimes differs from one jurisdiction to another. For example, the *Menhennitt* ruling in the Victorian Supreme Court in 1969⁷³ provided that abortion could be lawful if the accused held a belief which was honest and on reasonable grounds that the abortion was ‘necessary’ and ‘proportionate’. In New South Wales the *Levine* ruling⁷⁴ in the District Court in 1971 stated that an abortion would be lawful if there was any ‘economic, social or medical ground or reason’ upon which a doctor could have a reasonable and honest belief that it was necessary to perform the abortion to avoid a ‘serious danger to the pregnant woman’s life or to her physical or mental health.’ Since being reinterpreted by Kirby J in *CES v Superclinics*⁷⁵ the NSW Levine ruling is generally viewed as a more liberal rule than that of *Menhennitt*.

In the Australian Capital Territory the offence of abortion has been abolished. The other more liberal jurisdictions⁷⁶ are the Northern Territory, South Australia, Tasmania and Western Australia where it is lawful for an abortion procedure to be performed by a medical practitioner.⁷⁷ The grounds on which a lawful termination may be performed differ as do the limitations on duration of pregnancy. The SA *Criminal Law Consolidation Act 1935*, for example provides that an abortion cannot be performed after 28 weeks, the exception is where the abortion is performed in good faith and solely to preserve the life of the pregnant woman. Prior to this outer time limit an abortion can be carried out when the ‘maternal health ground’ or the ‘foetal disability ground’ is satisfied. The ‘maternal health ground’ refers to the physical or mental health of the pregnant woman being at risk and the ‘foetal disability ground’ is satisfied if there is a substantial risk that the child will be seriously physically or mentally handicapped. The Northern Territory *Criminal Code* s174(1)(a)(i) applies where a woman is no more than 14 weeks pregnant and allows terminations to take place up to 23 weeks if the termination is necessary to prevent grave injury to the woman’s health.

(b) laws that create the crime of ‘child destruction’ and

Abortion laws reflect a time line approach to the fetus as a potential human being. This replicates the concept of the pre-birth continuum. Through the child destruction

⁷² *Criminal Code* 1983 (NT) s 12, 173; *Crimes Act 1900* (NSW) ss82-82; *Criminal Law Consolidation Act 1935* (SA) s 81 s82; *Criminal Code 1924* (Tas) s 134,135; *Crimes Act 1958* (Vic) ss65, 66 *Criminal Code* (WA) ss199, 200, 201

⁷³ *R v Davidson* [1969] VR 667. This approach was adopted in Queensland in *R v Bayliss and Cullen* (1986) Queensland Law Reps 8 known as the 1986 District Court McGuire Ruling and affirmed by a single judge in the Supreme Court in *Veivers v Connolly* [1995] Qd R 326

⁷⁴ *R v Wald* (1971) 3 NSWDCR 25

⁷⁵ *CES v Superclinics (Australia) Pty Ltd* (1995) 38 NSWLR 47 the *Levine* ruling was more liberally interpreted by Kirby J in the *Superclinics* case where His Honour stated that dangers to a pregnant woman’s health should not be limited just to her pregnancy.

⁷⁶ The word ‘liberal’ is used as it indicates that in these jurisdictions criminality either does not exist in relation to terminations or may be removed where the termination is legally justified.

⁷⁷ *Criminal Code* 1983 (NT) s 174; *Criminal Law Consolidation Act 1935* (SA) s 82A; *Criminal Code 1924* (Tas) s 164; *Health Act 1911* (WA) s 334. There is a lack of consistency in the legislation – for example the lawfulness only applies for pregnancies of less than a certain duration – 14 weeks in the Northern Territory.

provisions the notion of ‘capable of being born alive’ is added to the traditional ‘born alive’ rule. This crime applies only to abortions performed late in pregnancy. The crime of child destruction covers situations where neither the offence of abortion nor the offence of murder or manslaughter is appropriate. As such, it is meant to cover the period where the fetus is viable – capable of being born alive – but before it is born and attains the status of a human being. Such a crime does not exist in Tasmania.⁷⁸

The definition of an unborn child differs between jurisdictions. In both South Australian and Victoria it is unlawful to act to intend to destroy a ‘child capable of being born alive’ before it has an existence independent of its mother. The exception is where that act is done in good faith to preserve the mother’s life. Both South Australia and Victoria provide that where the pregnancy is 28 weeks or more that is *prima facie* proof that a woman is carrying a ‘child capable of being born alive’. Thus 28 weeks is the *prima facie* legal test of viability in those jurisdictions.

The remaining statutes are less exact. Most refer to a fetus being capable of being born alive. For example section 165 of the Tasmanian *Criminal Code* does not strictly describe a child destruction offence and is not clearly applicable as such. But it prohibits causing death to a ‘child who has not become a human being’ in such a manner that the person causing death would have been guilty of murder if such a child had been born alive, unless the death is caused by an attempt in good faith to preserve the mother’s life. In the Australian Capital Territory section 42 of the *Crimes Act 1900* makes child destruction an offence:

A person who unlawfully and, either intentionally or recklessly, by any act or omission occurring in relation to a childbirth and before the child is born alive—

- (a) prevents the child from being born alive; or
- (b) contributes to the child's death;

is guilty of an offence punishable, on conviction, by imprisonment for 15 years.

The South Australian *Criminal Law Consolidation Act 1935* provides that an abortion cannot be performed in pregnancy with intent to destroy the life of a child capable of being born alive. The legislation in s82A(8) states that the fact that when a woman has been “pregnant for a period of twenty-eight weeks or more shall be *prima facie* proof that she was at that time pregnant with a child capable of being born alive.” Section 10 of the Victorian *Crimes Act* also creates the child destruction offence at 28 weeks. Both South Australia and Victoria are *prima facie* offences which means that it is possible for the limit to be lower – United Kingdom cases have indicated that a child is capable of being born alive at 22-23 weeks.⁷⁹

⁷⁸ *Crimes Act 1900* (ACT) s42; *Crimes Act 1958* (Vic) s 10; *Criminal Code 1924* (Tas) s 165; *Criminal Code 1983* (NT) s170; *Criminal Code 1899* (Qld) s 313 *Criminal Code* (WA) s290. NSW now has a form of child destruction - see below.

⁷⁹ Cica N, above points out that English authority on child destruction may protect a foetus as early as 22 weeks in pregnancy.

In Queensland and NSW new crimes have been introduced to deal with attacks on pregnant women. Section 313 of the Queensland *Criminal Code* is titled 'Killing unborn child'.⁸⁰ The original and only section of the code made it a crime to unlawfully assault a pregnant woman and destroy the life of a child capable of being born alive:

Any person who, when a female is about to be delivered of a child, prevents the child from being born alive by any act or omission of such a nature that, if the child had been born alive and had then died, the person would be deemed to have unlawfully killed the child, is guilty of a crime, and is liable to imprisonment for life.

Subsection (2) was subsequently added:

(2) Any person who unlawfully assaults a female pregnant with a child and destroys the life of, or does grievous bodily harm to, or transmits a serious disease to, the child before its birth, commits a crime. Maximum penalty—imprisonment for life.

The purpose of subsection (2) is to make an 'unborn child' one that dates from conception.

In New South Wales the 2003 case of *R v King* [2003] NSWCCA 399 led to similar reforms. King attacked Ms Flick, who was pregnant with his child assaulting her including kicking her in the stomach and stomping on her stomach about half a dozen times. The fetus was delivered stillborn 3 days later. The pregnancy was between 23 and 24 weeks advanced. King was charged alternatively with the offences of intentional infliction of grievous bodily harm to Ms Flick and procuring a miscarriage.⁸¹ In relation to the charge of grievous bodily harm, the Crown relied upon the death of the fetus and the abruption of the placenta as constituting grievous bodily harm to Ms Flick. The issue was whether or not the death of a fetus is capable of constituting grievous bodily harm to a pregnant mother. The trial judge referred to the decision of the House of Lords in *Attorney-General's Reference (No 3 of 1994)* [1998] AC 245 as authority for the proposition that a fetus was a "unique organism" and as having overruled earlier authority that a fetus was an integral and inseparable part of the mother. On appeal the court, Spigelman CJ, Dunford and Adams JJ held that the fetus was part of the body of the woman.

The *Crimes Act 1900* (NSW) was subsequently amended,⁸² individuals will now be punished for destruction of a fetus.⁸³ Noticeably, the legislation makes no attempt to

⁸⁰ Section 290 of the WA *Criminal Code* is equivalent to s313(1) of the Queensland *Criminal Code* 1899; s170 of the NT *Criminal Code* is also nearly identical.

⁸¹ *Crimes Act 1900* (NSW) s 33 and s 83 respectively.

⁸² The definition in section 4 of "Grievous bodily harm" now includes:

- (a) the destruction (other than in the course of a medical procedure) of the foetus of a pregnant woman, whether or not the woman suffers any other harm, and
- (b) any permanent or serious disfiguring of the person.

⁸³ Similar provisions exist in Victoria where s 33 of the *Crimes Act 1958* provides that a foetus is part of the mother, and consequently an assault which causes the death of the foetus involves the offence of inflicting grievous bodily harm.

define the terms ‘foetus’ and does not refer to the destruction of a fetus as murder. Indeed section 20 of the *Crimes Act 1900* (NSW) explicitly states that when a person is on trial for the “murder of a child, such child shall be held to have been born alive if it has breathed, and has been wholly born into the world whether it has had an independent circulation or not.”

The criminal law differentiates categories of crime according to the development of the fetus. In a time lineal fashion criminal law creates separate categories of crime for a viable as opposed to a pre-viable fetus. Limits on late term abortions and crimes of child destruction reflect a recognition within this area of law that the legal recognition of a fetus for the purposes of crimes being committed alters along a pre-birth continuum.

(c) *the law of homicide.*

Every Australian jurisdiction prohibits unlawful homicide.⁸⁴ Homicide describes a variety of criminal offences that cover manslaughter through to the most serious crime of murder. In essence in every Australian jurisdiction, a fetus cannot be the victim of any kind of homicide. This is the case irrespective of the stage of pregnancy at which it succumbs. As Cica states:⁸⁵

A foetus can only be the victim of murder or manslaughter if it is born in a living state. For these purposes, a child is born in a living state when it – but not necessarily the umbilical cord, placental tissue or afterbirth – is completely extruded from the pregnant woman’s body. Except in the Australian Capital Territory, and in New South Wales for murder prosecutions, a child need not have breathed to be considered born alive. Nor is it necessary that the child be viable in the sense that it has the capacity to stay alive. A functioning heart is probably sufficient. Birth includes the surgical removal of a child from its mother, as in the case of Caesarean section, as well as vaginal delivery.

The thrust of the criminal law in relation to abortion has been to clearly demarcate the crimes of murder and manslaughter from the death of a fetus or unborn child. The reason for this rests in the difficulty that if the legal definition of personhood was extended to include the fetus, then the law would recognize mother and fetus as two distinct legal persons. This leads inevitably to a conflict of rights between the mother and fetus and even to the policing of pregnancy to ensure that a mother does nothing to harm her fetus in any way.⁸⁶

Child Protection laws

⁸⁴ See Criminal Law *Hasbury’s Laws of Australia*

⁸⁵ Cica N above at 32

⁸⁶ Submission of the NSW Council for Civil Liberties and the UNSW Council for Civil Liberties to the NSW Attorney-General’s *Review of the Law of Manslaughter in New South Wales*, 7 February 2003, at 3

Four Australian jurisdictions provide for some protection pre-birth, allowing for intervention by government authorities to ‘protect’ the unborn child.⁸⁷ In Queensland a 2004 amendment, s21A of the *Child Protection Act 1999* applies to allow for civil intervention by the authorities “...if, before the birth of a child, the chief executive reasonably suspects the child may be in need of protection after he or she is born.” The provision has been described as giving “...much more extensive protection to unborn children than any other Australian provision. The legislation appears to cover unborn children from the time pregnancy has been detected in the pregnant woman, and covers situations where grievous bodily harm is inflicted on, or a serious disease is transmitted to, the unborn child”⁸⁸. In South Australia the *Children’s Protection Act 1993* covers unborn children, in Western Australia the *Child Welfare Act 1947* allows a notification to be recorded and an assessment conducted to determine whether a likelihood of harm exists for the child once born, and to plan for the safety of the child after birth. It has been stated that the NSW *Children and Young Persons Care and Protection Act 1998* also provides for reports concerning unborn children. The stated intention is to provide early intervention to reduce the risks to the baby at the time of birth.⁸⁹

Births, Deaths and Marriages

At common law if a child is not born alive there can be no death. This common law rule has been modified by births, deaths and marriages legislation in all states and territories⁹⁰ which provides for the compulsory registration of births, deaths and marriages.

In all jurisdictions the definitions section of the legislation means that a birth includes a still-birth. A still born child is defined as a child of at least 20 weeks gestation, or who weighed at least 400 grams at birth or delivery and who has not exhibited any sign of respiration or heartbeat or other sign of life after birth.⁹¹ A still-born child must therefore be registered as being born and in South Australia and Western Australia must also be registered as being dead as in South Australia and Western Australia a death includes a

⁸⁷ For a discussion paper which overviews and compares Australian jurisdictions see Bromfield L & Higgins D ‘National comparison of child protection systems’, Child Abuse Prevention Issues, No. 22 Autumn 2005 <http://www.aifs.gov.au/nch/issues/issues22.html> viewed 20 June 2005

⁸⁸ NSW Attorney-General’s *Review of the Law of Manslaughter in New South Wales*, April 2003, available at <http://www.lawlink.nsw.gov.au> at 75

⁸⁹ This is drawn from commentary about the range of the legislation see note 87 <http://www.aifs.gov.au/nch/issues/issues22.html#statutory>.

⁹⁰ *Births, Deaths and Marriages Registration Act 1997* (ACT); *Births, Death and Marriages Registration Act 1996* s 35(1) (NT); *Births, Deaths and Marriages Registration Act 1995* (NSW); *Births, Deaths and Marriages Registration Act 2003* (QLD); *Births, Deaths and Marriages Registration Act 1996* (SA); *Births, Deaths and Marriages Registration Act 1999* (TAS); (VIC) *Births, Deaths and Marriages Registration Act 1996* (VIC); *Births, Deaths and Marriages Registration Act* (WA).

⁹¹ *Births, Deaths and Marriages Registration Act 1997* s4(1) (ACT); (NT) *Births, Deaths and Marriages Registration Act 1996* s4 (NT); *Births, Deaths and Marriages Registration Act 1995* s4(1) (NSW); *Births, Deaths and Marriages Registration Act 2003* Sch2 (Qld); *Births, Deaths and Marriages Registration Act 1996* s4 (SA); *Births, Deaths and Marriages Registration Act 1999* s 3 (TAS); *Births, Deaths and Marriages Registration Act 1996* s4(1) (VIC); *Births, Deaths and Marriages Registration Act 1998* s4 (WA).

still-birth.⁹² In the remaining jurisdictions the definition of death specifically excludes a still-birth, however in these jurisdictions a still-born child must be buried or cremated.⁹³

In all jurisdictions particular procedures must be followed in relation to the medical examination and the disposal of the body of a still-born child. A child which is less than 20 weeks gestation or 400 grams in weight need not be buried or cremated as it is considered pre-viable. Hospitals where such children are born are governed by the Human Tissue Acts, which generally provide that once tissue is removed from a person they have no right to determine what will be done with that tissue. The human tissue legislation specifically include fetal tissue within the definition of tissue.⁹⁴

The legislation which regulates births and deaths clearly reflects a pre-birth continuum. Pivoting around the notion of viability, the 20 week or 400 grams provision delineates between a fetus that may survive birth and one which will not.

Accident compensation acts

In Victoria recovery of common law damages in respect of injuries which arise out of employment or transport accidents is limited only to those cases where a person suffers a serious injury. In both the *Accidents Compensation Act 1985* (Vic) and the *Transport Accident Act 1986* “a serious injury” is defined to include “loss of a foetus”.⁹⁵ Further a 2004 amendment to the *Accident Compensation Act 1985* (Vic) section 98C provides for compensation for non-economic loss and states that the amount of non-economic loss ‘in respect of an injury resulting in the loss of one foetus or of the loss of more than one foetus is \$53 270’ defining in s98C(4) that ‘foetus means the conceptus beyond the sixteenth week of development.’ In the ACT and Victoria victims of crime legislation allows for the award of financial assistance to persons who suffer very serious injury and the relevant legislation defines serious injury as including “loss of a foetus”.⁹⁶

Immigration: must the interests of an unborn child be considered?

The common law “born alive” rule has been specifically recognised and applied in the area of immigration law in Australia where the Administrative Appeals Tribunal has refused to include the interests of unborn children as relevant considerations on the exercise of ministerial discretion to refuse visas to their parents.

⁹² *Births, Deaths and Marriages Registration Act 1996* s4 (SA); *Births, Deaths and Marriages Registration Act 1998* s4 (WA). The Western Australian legislation specifically excludes terminations from its definitions of still-birth.

⁹³ <http://www.health.nsw.gov.au/pubs/2004/pdf/funeralindustry.pdf> viewed 24 May 2006

⁹⁴ *Human Tissue Act 1983* (NSW); *Transplantation and Anatomy Act 1978* (ACT); *Human Tissue Transplant Act 1979* (NT); *Transplantation and Anatomy Act 1979* (Qld); *Transplantation and Anatomy Act 1983* (SA); *Human Tissue Act 1985* (Tas); *Human Tissue Act 1982* (Vic); *Human Tissue and Transplant Act 1982* (WA)

⁹⁵ *Accidents Compensation Act 1985* (Vic) s135A, *Transport Accident Act 1986* (Vic) s93

⁹⁶ *Victims of Crimes (Financial Assistance) Act 1983* (ACT) s 11; *Victims of Crime Assistance (Special Financial Assistance) Regulations 2000* (Vic) s 4.

The decision of Deputy President Forgie in the Administrative Appeals Tribunal in *Ly and Minister for Immigration and Multicultural Affairs* [2000] AATA 339 (28 April, 2000) considered whether an unborn child was a “child” whose the interests were a “primary consideration” within a Ministerial Direction⁹⁷ governing the exercise of discretion under s.501 *Migration Act 1958* (Cth) to refuse a visa to the mother on character grounds.

The High Courts decision in *Minister for Immigration and ethnic Affairs v Teoh* (1995) 128 ALR 353 was considered. There the High court was concerned with the relevance of the *United Nations Convention on the Rights of the Child* which requires states to ensure that children are not separated from their parents unless separation is in the best interests of the child (Article 9). The Convention was ratified by Australia on 17 September, 1990 and came into force in Australia on 16 January 1991 was held by a High Court majority not to be part of the municipal law of Australia. It was held however that ratification of a convention is a positive statement by the executive government that the executive will act in accordance with the Convention and that statement is an adequate foundation for a legitimate expectation that administrative decision makers will act in conformity with the Convention.

The issue in the *Ly* case was whether the Convention required the interests of an unborn child to be considered when exercising discretion under the *Migration Act*. Article 1 of the Convention defines a child as a “human being below the age of 18 years...” so the issue for Deputy President Forgie was whether the unborn child was a ‘human being’. The Deputy President referred to various other international instruments which referred to “humanness” but which provide no definition of a “human being”. She referred to some specific protections provided in those instruments to unborn children. She also referred to the criminal law and the civil common law in Australia, in particular the ‘born alive’ rule noting the “fiction” which has sometimes been employed to protect the rights of the unborn.

The Deputy President decided ultimately that:

...an unborn child cannot be regarded as a human being in that context (of the Convention). That is not to say that an unborn child does not receive acknowledgement in the Preamble to the Convention and specific recognition that it requires special safeguards and care, including appropriate legal protection, before as well as after birth. Equally the unborn child receives specific recognition in the DRC (the Declaration of the Rights of the Child 1959) and implied recognition in the ICCPR’s (International Covenant on Civil and Political Rights 1996) prohibition of capital punishment upon pregnant women. But it is specifically because the international instruments need to give specific or implied recognition to unborn children in specific circumstances that adds weight to the conclusion that its general provisions relate to a child who is separate from its mother and so has become a human being as it has been understood at common law.

⁹⁷ Direction in place was General Direction No. 5, 25 November 1997

Accordingly the Deputy Commissioner decided that the welfare of an unborn child was not a primary consideration when exercising discretion under s. 501 *Migration Act 1958*(Cth) because an unborn child was not a "human being" within the *UN Convention on the Rights of the Child* definition⁹⁸.

Interestingly, the year following the decision in *Ly*, the Migration Review Tribunal decided in an application by *Dang, Van Dong* that on an application for a spouse visa: 99

Australia's obligations to the as yet unborn child under the *United Nations Convention on the Rights of the Child* do include exercising discretion in favour of enabling a child to be with both parents.

The issue here is not identical to that in *Ly* as that case concerned the question of exercise of the ministerial discretion not to refuse a visa on character grounds under S. 501 of the Act. The issue in *Dang* concerned the question of the issue of a visa on the basis of marriage to an Australian citizen where there were reasons of a "strongly compassionate" nature. It is noteworthy though, that the two tribunals take opposite views of the effect of Australia's obligations under the *UN Convention of the Rights of the Child* on a consideration of the welfare of a child who is unborn at the time of the determination.

Family Law

In the Marriage of F it was held that a fetus is not a 'child' for the purposes of a husband's application to the court for an injunction in order to prevent his estranged wife terminating a pregnancy.¹⁰⁰ The court held that a child did not obtain a legal personality until birth and that:¹⁰¹

it is a matter of violent public debate whether an abortion amounts to the killing of a child. That is really a moral or ethical question and it is not a question which this court, or any court, for that matter, is required to answer. This court, like any other, is concerned with legal rights and obligations, not moral or ethical ones. My task is to interpret and apply the law, not any particular moral or ethical precepts.

The court also decided that an unborn child does not have a claimed right to be allowed to come into existence as a person.¹⁰² Indeed Justice Lindenmayer determined in *In the Marriage of F* that the references to 'child' in the *Family Law Act 1975* (Cth) refer to a living child, stating:¹⁰³

⁹⁸ Deputy Commissioner Forgie reached the same conclusion on the question of consideration of the rights of an unborn child in the later case of *Zefis and Minister for Immigration and Indigenous Affairs* [2002] AATA 700 (16 August 2002).

⁹⁹ *Dang, Van Dong* [2001] MRTA 3843 (22 August 2001), Presiding Member: Megan Hodgkinson

¹⁰⁰ *In the Marriage of F* (1989) 13 Fam LR 189 FLC 92-031

¹⁰¹ At para [17]

¹⁰² "...which right I have held does not exist" at para [35]

¹⁰³ At para [38]

In my opinion, the only section of the Act in which the word "child" includes an unborn child is s.66X, which deals with the maintenance of a mother by the father of an illegitimate child during the childbirth maintenance period.

Section 66X has now been replaced by an identical section 68B which recognises a pre-birth entity as it allows a woman to sue for personal support during a pregnancy from someone that the mother is not married to but who is responsible for the child. It follows that parenting orders cannot be made under s 64B relating to unborn children. Nor can orders be made by the court with respect to unborn children under other parts of the Act which refer to children such as s 67ZC. Another example is *In the Marriage of Diesel* (1980) 6 Fam LR 1 which discusses section 63 establishing that an unborn child is not a child of the marriage for the purposes of this section as the statute was intended to operate from birth not from conception.

Social Security law

In *Re Department of Social Security and Abaroa* (1991) 22 ALD 787 Deputy President P Gerber of the Administrative Appeals Tribunal raised but did not answer the question of residency for the purposes of determining an entitlement to an invalid pension of a child on turning 16 years of age where the qualifying event for the pension must have 'occurred at a time when the claimant was an Australian resident.' The child's disability occurred in utero. President Gerber states:

Applied to this case, the applicant was diagnosed as suffering from cerebral palsy at birth whilst he was an Australian resident (it is a nice question whether, assuming the injury occurred *in utero*, a foetus can be said to be "resident" anywhere) and is not otherwise disqualified from his claim by the exclusionary provisions of s 28.

Clearly raised as a point of speculation the above comment by Deputy President Gerber indicates how an area of law such as social security may need to determine such questions as to where on the pre-birth continuum the unborn child will be incorporated into decision making.

Sport and discrimination law

In *Gardner v National Netball League Pty Ltd* [325 FC 260]¹⁰⁴ an application for an interim injunction was made under the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) s46PP. The applicant was a participant in the National Netball League who was 15 weeks pregnant and attempting to play netball in contravention of the League ban on pregnant players. The injunction was granted as expert evidence was given that the fetus is not endangered if applicant continued playing

¹⁰⁴ [2001] FMCA 50, BC200104127 on 18 July. The issue was also mentioned in *Ferneley v Boxing Authority of NSW* (2001) 191 ALR 739 before Wilcox J where a discrimination claim by a female boxer applying for registration as a professional was rejected, a reason given that: "Special risks for women appear to be associated with injury to the reproductive organs and, in particular, to a potential risk to an unborn foetus if a women were pregnant at the time of her involvement in a boxing match."

League netball until 20 weeks pregnant. Discrimination law demonstrates a recognition of the unborn for the purposes of the pre-birth continuum at 20 weeks. After this lineal time point the fetus requires/deserves/is given the protection of the law and a pregnant woman is held not to be discriminated against if she is prevented from playing sport.

Ethical Regulations – Fetal Tissue Transplantation

Research on fetal tissue including the transplantation of such tissue is governed by ethical guidelines determined by the National Health and Medical Research Council. Such research may have critical wider repercussions for possibilities of cures for diseases such as Parkinsons and Alzheimers.¹⁰⁵ The regulation of fetal tissue research explicitly incorporates notions of viability. It determines that recognition on the pre-birth continuum arises at the point of viability, when a fetus has the capacity to survive without the mother if born prematurely.

The *National Health and Medical Research Council Statement on Human Experimentation* has attached to it a Supplementary Note published in 1983 and states that it is ‘intended as a guide on ethical matters for research involving the human fetus or human fetal tissue.’¹⁰⁶ The Guidelines restrict research to a previable fetus stating that research should not be carried out when there is a beating heart or other signs of life:¹⁰⁷

For the purposes of medical research, a separated previable fetus is at present regarded as one that has not attained a gestational age of 20 weeks and does not exceed 400g in weight. Adoption of this description will prevent inadvertent withholding of life-sustaining treatment from a separated fetus that may in fact be viable.

Conclusion

The above analysis reveals that a uniform legal approach to defining the fetus is an impossibility. Instead, a ‘silo’ approach, whereby every legal area has separate determinations on the legal recognition of the fetus is now a reality. This approach, apart from being pragmatic, is arguably the most appropriate. Areas of law such as patent law cannot be equated with an application to the court to restrain an abortion – clearly patent

¹⁰⁵ Such as the use of human fetal tissue: Tuch BE, Scott H, Armati PJ, Tabiin MT and Wang LP, “Use of human fetal tissue for biomedical research in Australia, 1994–2002” (2003) 179(10) *Medical Journal of Australia* 547. The tissue is used for drug testing and for studying tissue development, viruses and diabetes. In 2002 it was reported that scientists have been able to grow human embryonic stem cells on a feeder layer of human fetal cells (Richards, M., (2002) *Nature Biotechnology*) The guidelines state:

For the purpose of these guidelines the terms fetus and fetal tissue include respectively the whole or part of what is called the embryo, fetus or neonate, from the time of implantation to the time of complete gestation, whether born alive or dead.

¹⁰⁶ Supplementary Note No. 5 to the National Statement on Ethical Conduct In research Involving Humans see <http://www.nhmrc.gov.au/ethics/human/issues/fetal/supp5.htm> viewed 26 February 2006

¹⁰⁷ See <http://www.nhmrc.gov.au/ethics/human/issues/fetal/supp5.htm> viewed 6 March 2006

law, family law, criminal law as well as the other areas identified in this article will have different policy requirements and serve varying social, economic and moral interests.

The fact that the law recognizes the fetus along a continuum prior to birth frees the policy maker, the judge and the legislator from the difficult definitional question embedded in morality, religion and ethics as to determining when human life begins (unless that is within the parameters of the law in question). The pre-birth continuum accords with Seymour's view¹⁰⁸ that the law has moved past the traditional case law definitional approach of asking what is the fetus. Further, the identification of a legal pre-birth continuum both debunks the myth of the prevalence of the born alive rule and exposes generalizations whereby legal 'trends' are viewed as '...attaching ever greater significance to the foetus as it approaches viability.'¹⁰⁹ Or that the elevation of "...the foetus to patient status is a product of the medicalisation of reproduction and reflects a medical perception of the maternal foetal/ relationship."¹¹⁰ This is the case as a pre-birth continuum highlights that the law is responsive, driven by policy and thereby reacting to developments in an ad hoc non-uniform fashion.

The following table demonstrates the contrasting points of recognition of the fetus along the pre-birth continuum by the diverse areas of Australian law considered in this article. Clearly the traditional 'born alive' rule no longer informs decision making in many of these very challenging areas. Rather the legislature and the courts have adopted a twentieth century approach which recognizes a 'pre-birth continuum'.

TABLE 1: Overview of the Pre-birth Continuum

AREA	LAW	FIRST RECOGNITION
Inheritance law/succession	Common law/Legislation	Frozen embryo/Unborn
Torts	Common law	Before conception
Criminal	Legislation	In utero (a range)
Contracts	Legislation	Embryo fetus
Births/Deaths	Legislation	20 weeks (or 400 grams)
Patents	Legislation	Process of creation
Cloning	Legislation	<8 weeks
Infertility	Legislation	<8 weeks
Child Protection	Legislation	In utero
Medical Research	Ethical guidelines	20 weeks (or 400 grams)
Sports law / Discrimination	Legislation	20 weeks
Parens patriae	Common law	Birth

¹⁰⁸ Seymour J, "Legal status of the fetus: an international review" (2002) 10 Journal of Law and Medicine 28.

¹⁰⁹ McGovern B, "Bioethics & the Law – the Impact of Genetic Technology on Prenatal management" (1995) 2(3) Murdoch University Electronic Journal of Law at 9

¹¹⁰ McLean SAM & Petersen K, "Patient Status: The Foetus and the Pregnant Woman" (1996) Australian Journal of Human Rights www.austlii.edu.au viewed June 2006

Child protection	Statute	In utero
Accident compensation	Legislation	In utero
Immigration	Legislation	Birth
Family Law	Legislation	In utero